

Is Article 50 Reversible? On Politics Beyond Legal Doctrine

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Reversibility of the notification to withdraw is at the center of interpretative disputes on article 50 TEU. The UK government argued and the High Court upheld that the notification of withdrawal is not revocable. Virtually, all parties at the Supreme Court case have held the same view. On the contrary side of the argument, consensus among scholars ([Paul Craig](#),¹ [Daniel Sarmiento](#),² [Philip Syrpis](#))³ and practitioners (such as [Jean Claude Piris](#)⁴ or [Andrew Duff](#)⁵) takes the opposite view. In line with the later and continuing a [previous publication](#),⁶ I argue that revocability fits neatly in the letter and spirit of article 50 because of formal and substantive reasons. I further content that the Supreme Court decision may create a bifurcation in which interpretation of a key TEU provision may become purely an issue of domestic law. However, I further content that actors' political decisions have progressively framed a situation in which revocability does not seem politically possible.

Revocability of the notification to withdraw in article 50 results from the concurrence of formal and substantive arguments. The formal arguments combine the following three sources:

- Hermeneutic interpretation. Although an explicit entitlement to backtrack does not exist in article 50, nothing in the provision explicitly rules out neither the possibility of a state reversing its initial intention. The House of Lords referred precisely to this literal interpretation to conclude that the notification was revocable.⁷ The treaty refers to the notification of intention to withdraw (not a decision). Truly, the complete wording of the provision reads “*A Member State which decides to withdraw shall notify the European Council of its intention*” combining thus decision and intention. Although decisions convey a stronger sense of commitment to the end pursued than intentions, in purely logical terms, both decisions and intentions can be reversed unless some act makes them final. From the point of view of EU law, what makes final the notification is the expiration of the two-year period or the conclusion of the withdrawal agreement. Those who participated in the Convention and who could be somehow considered drafters of the Treaty (Amato, Duff, Kerr, Piris) have unanimously argued that the provision is revocable.
- Arguments from international law. The Vienna Convention on the Law of the Treaties, in particular its article 68, establishes that *a notification of intention to withdraw may be revoked at any time*. Assuming that the TEU is in last instance an international treaty signed among sovereign states, Paul Craig has argued that the Vienna Convention informs the very architecture of article 50.
- Precedents in international law. Article 50 is not an institutional innovation of the EU: most international organizations require a ‘preparation’ or ‘cooling off’ period between the announcement of withdrawal and effective withdrawal and this period varies between ninety days (for instance, in the Korean Peninsula Energy Development Organization KENDO) and two years (for instance, in the Organization of American States OAS), with one year being the most common period. In these international organizations, the delay between announcement and effective withdrawal serves as a ‘cooling off’ period allowing the withdrawing State to change its position. For instance, Spain decided not to withdraw from the League of Nations in 1928 shortly before its notice to do so would have taken effect.

Substantive arguments in favor of revocability pivot on a hypothetical change of circumstances in the state withdrawing from the organization. For instance, new elections may alter the constellation of forces between remainers and leavers creating a new mandate and/or that national politicians (or public opinion) may come to the conclusion that the effects of Brexit are totally unacceptable or too costly. In particular, the uncertainty about future relations with the EU may only disappear once negotiations have started and only at that point, a sober pondering of the future British relationship with the EU may call for [revoking the notification](#).⁸ In any case, since nothing in the wording of the treaties requires that withdrawal be conditional upon certain circumstances, the

same applies to revoking the decision, what means that no substantive arguments are needed for revoking the notification.

On this background, the Supreme Court faces several options for its ruling:

First of all, it may decide whether to adjudicate or not on the revocability of the notification under article 50. Should the Supreme Court amend the High Court ruling and declare the revocability of the notification of withdrawal, this might create an internal political dispute but, in substance, most likely this seems to be the hypothetical course of action that the ECJ would follow and, hence, this decision would not be noticeable from the point of view of EU law.

But if the Supreme Court confirms the High Court view, this ruling would consolidate a specifically British interpretation on the commitments that may be at odd with the hypothetical ECJ one. Although there may not be doubt that the ECJ remains the solely interpreter of the Treaties, the prospects of an appeal for a preliminary ruling seem very slim. At this stage, though, an ECJ interpretative ruling would be highly functional for the EU if only for avoiding any pollution on the interpretation of article 50 stemming from the UK internal legal (and political) battle which could in future reach other cases. Hypothetical confirmation of non-revocability plus a refusal to refer for preliminary ruling could consolidate an interpretative bifurcation (between UK courts and the ECJ) in which UK courts may be perceived as defying ECJ (and EU law supremacy. Defiance expands the ground already paved by the German Constitutional Court in its Lisbon ruling when it argued that verification of the fulfilment of domestic constitutional conditions for withdrawal remained a national prerogative.

Of course, this very defiance results functional with the objective of separating national legality from EU one creating thus a Catch 22 situation. For the long term, the current UK situation may create a precedent: lack of ECJ adjudication on the interpretation of article 50 may create a vacuum which national courts may be tempted to fill but this will happen in these situations in which national sovereignty is asserted in last instance (i.e. withdrawal). This is the less desirable context to settle issues about the preeminence of the ECJ in the interpretation of the Treaty.

Far from being a pure legal nicety, revocability has huge political implications: it determines the framework for political action. The possibility of revoking notification results particularly important in the event that exit negotiations are not concluded in the two year period. Whilst the practical aspects object of these negotiations (such as division of assets and liabilities between the EU and the UK) are relatively feasible, it seems that the transitional agreement required to bridge membership and the agreement on future UK relations with the EU may take longer. The European Council may decide by unanimity (with the exclusion of the UK vote) to extend the negotiating period and this period could be hypothetically, an undefined one. This undefined extension would define a kind of limbo membership for the UK which would create the possibility of revoking membership at any time in future (provided that the parties do not conclude the agreement).

Contrary to the legal possibility of withdrawal, the actions of the two sides of the process, the UK government and EU authorities, have given abundant evidence that neither of them contemplates revoking the notification and hence the withdrawal process. On the British side, the UK government moved quickly and decisively to transform the referendum result into a final decision pending notification. Firstly, cabinet reshuffle including the designation of a new Prime Minister, creating a specific Brexit department and appointing key Brexiters (Davis, Johnson and Fox) transformed the pro-remain cabinet into a wholehearted Brexit one. Theresa May completed her own turn from mildly remainer by enthusiastically announcing her commitment to hard Brexit at her speech at the Conservative Party Conference at the beginning of October 2016. At the same moment, secondly, Theresa May decided to set a fixed and known date for the notification of the intention (in late March 2017) which meant *ceteribus paribus*, that the UK will leave the EU by the end of March 2019. The introduction of a Great Repeal Act (whit little practical significance) signaled also her determination. Thirdly, the government has increasingly marked its acceptance of the rhetoric on *hard Brexit* signaling a pre-disposition to accept withdrawal no matter the costs. Finally, in early October 2016, the government argued, in its submission to the High Court, that, as a matter of firm policy once notification was given on article 50, this would not be withdrawn.

In parallel, the EU authorities, both Union institutions and governments from other member states, have equally

constructed a consistent discourse which signals that they do not contemplate the option of the UK revoking its decision. Differently to previous occasions, there have not been utterances calling for re-thinking the result nor even for a sobering of the timing of the process. Quite the contrary, EU leaders have called for starting the process as soon as possible, and they have ruled out any pre-negotiation which would have given the UK government some clue and, perhaps, a comprehension of the situation as base of a hypothetical revocability. More surprisingly, an almost complete unanimity seems to inform positions, and this comprises even the substantive issues – the non-divisibility of market access and freedom of circulation.

Actions match also words, and all decisions taken by the European authorities diminish the margin of manoeuvre for revoking the notification. Exemplary in this determination, the EP, for instance, approved already on 28th June 2016 a Resolution calling for the President of the Commission to reallocate the portfolio of the British commissioner, to alter the order of the Presidencies of the Council and warning that no new relationship with the UK may be negotiated before the conclusion of the withdrawal agreement.⁹ But the European Council also produced evidence in the same direction: meetings of the 27 member states created a *de facto* exclusion which visually exhibits UK withdrawal. EU institutions, be these the Council, the Commission and the EP have moved swiftly and *before a notification existed* to appoint their negotiating teams. And on 16 December, the leaders of the 27 approved procedural steps to be launched immediately after the notification, foreseen general guidelines as well as more detailed negotiation guidelines to be adopted by the Council of Ministers. In conclusion, even though the notification under article 50 may be revoked, actors have behaved as if this is not going to happen. In this sense, political determination has trumped legal interpretation.

1 Craig, Paul Brexit: Foundational Constitutional and Interpretive Principles: II Oxford Human Rights Hub

2 Sarmiento, Daniel Miller, Brexit and the (maybe not to so evil) Court of Justice, VerfBlog, 2016/11/08,

3 See an uncommon divergence of this academic consensus in N. Barber, T. Hickman and J. King, 'Pulling the Article 50 'Trigger': Parliament's Indispensable Role', [U.K. Const. L. Blog \(27th Jun 2016\)](#)

4 Piris, Jean-Claude *Article 50 is not for ever and the UK could change its mind* September 1st 2016 Financial Times

5 Duff, Andrew Everything you need to know about Article 50 (but were afraid to ask), VerfBlog, 2016/7/4

6 Closa, C. (2016) Interpreting article 50: exit and voice and...what about loyalty? EUI Working Papers RSCAS 2016/71 Robert Schuman Centre for Advanced Studies Global Governance Programme-246

7 House of Lords (2016) [The process of withdrawing from the European Union European Union Committee 11th Report of Session 2015–16 HL Paper 138](#), accessed 5 July 2016

8 Syrpis, Philip What next? An analysis of the EU law questions surrounding Article 50 TEU: Part One

9 European Parliament resolution of 28 June 2016 on the decision to leave the EU resulting from the UK referendum, [P8_TA\(2016\)0294](#)

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